SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1300

MICHAEL KOZEMCHAK, PHILIP PRONZEN and ARCHADY LEHACH, as The Board of Trustees of ST. ANDREW'S UKRAINIAN ORTHODOX CHURCH OF BRIDGEPORT, CONNECTICUT,

Petitioners,

against

THE UKRAINIAN ORTHODOX CHURCH OF AMERICA and THE MOST REVEREND BISHOP ANDREI KUSCHAK, Ruling Bishop of the Ukrainian Orthodox Church of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented for Review	2
Constitutional Provision	2
Statement	2
Reasons for Granting the Writ	4
Conclusion	7

Appendices:

A. Opinion of the United States Court of Appeals	1a
B. Memorandum of the United States District Court Incorporating Findings of Fact and Order For Judgment	3a
C. Judgment of the United States Court of Appeals	28a

Cases Cited

Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U. S. 367 (1970) 4, 6, 7

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U. S. 440 (1969) 4, 5

Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen, 21 Ohio St. 2d 154, 256 N. E. 2d 212, *cert. den.*, 400 U. S. 827 (1970) 5

PAGE

Smith v. Church of God at Locust Valley, 326 F. Supp. 6 (D. Md. 1971) 6, 7

Watson v. Jones, 13 Wall. 679 (1872) 6

United States Constitution Cited

First Amendment 2

Statute Cited

28 U.S.C. Sect. 1254(1) 2

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MICHAEL KOZEMCHAK, PHILIP PRONZEN and ARCHADY LEHACH, as The Board of Trustees of ST. ANDREW'S UKRAINIAN ORTHODOX CHURCH OF BRIDGEPORT, CONNECTICUT,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael Kozemchak, Philip Pronzen and Archady Lehach, as The Board of Trustees of St. Andrew's Ukrainian Orthodox Church of Bridgeport, Connecticut, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sec-

ond Circuit, entered in this case on the 30th day of November, 1973.

Opinions Below

The opinion of the Court of Appeals below (Appendix A, *infra*. pp. 1a-2a) has not been reported. The District Court's memorandum incorporating findings of fact and order for judgment, (Appendix B, *infra*. pp. 3a-27a) was not reported.

Jurisdiction

The judgment of the Court below (Appendix C, *infra*. pp. 28a-29a) was entered on November 30, 1973. Rehearing was not sought. The jurisdiction of this Court is involved under 28 U.S.C. Sect. 1254(1).

Question Presented for Review

Did the Court below decide the church property dispute under the "neutral principles of law" as enunciated by this Court in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969)?

Constitutional Provision

The First Amendment, United States Constitution.

Statement

The present suit arises from the condemnation of St. Andrew's Ukrainian Orthodox Church of Bridgeport, Connecticut, in 1967 by the State for a public highway. On

September 4, 1969, the parishioners of St. Andrew's, the petitioners herein, all being citizens of Connecticut, commenced their suit for the proceeds of the condemnation award ($290,000) against the respondents, citizens of New York, in the United States District Court for the Eastern District of New York.

At trial on December 6 and 7, 1972, it was found by the District Court that the appellants were suing on behalf of an unincorporated religious society with capacity to sue in the federal courts. (Appendix B, pp. 23a, 24a). It was further found by the District Court that appellants performed substantial capital improvements to the church property over a number of years prior to the date of condemnation in July of 1967. (Appendix B, pp. 5a, 6a). Subsequent to the initial condemnation award appellants performed some 2,000 hours of work in 1968 and provided substantial labor and materials, upon the exhortations of respondents' attorney, Serge Mihaly, and St. Andrew's pastor, Father Gabriel Zapotocky. (Appendix B, pp. 19a, 20a). Indeed, the initial condemnation award amounted to some $170,000 and the final award amounted to some $290,000. The parishioners testified that they had performed the extensive post-condemnation improvements to St. Andrew's on the promises of their pastor, Father Zapotocky, and the respondents' attorney, Serge Mihaly, that the proceeds of the condemnation award would be utilized by the respondents for the acquisition of a replacement church.

The appellants argued that an express trust concerning the proceeds of the award existed, or, at least, that they had an equitable lien for the benefit of the increase to St. Andrew's amounting to the difference between $290,000 and $170,000. The District Court found that, although respondents' attorney, Mr. Mihaly, did exhort the appellants to undertake substantial post-condemnation improve-

ments to St. Andrew's, it was unlikely for an attorney to promise that the proceeds would be used for a replacement church, and discounted the parishioners' testimony—even though Mr. Mihaly never appeared to rebut such testimony. (Appendix B, pp. 18a-19a). Likewise, the District Court rejected appellants' equitable lien argument on the grounds that they had not established that the post-condemnation improvements, some 2,000 hours, had increased the value of the final award in 1969 (Appendix B, p. 24a).

Appellants filed a timely appeal to the Court of Appeals for the Second Circuit. On November 30, 1973, that Court affirmed the District Court "for substantially the reasons given in the memorandum of the district court." (Appendix A, p. 2a).

Reasons for Granting the Writ

The decision below should be reviewed because it is in conflict with the applicable decisions of the Court in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969).

This is a church property dispute between representatives of the local church and the central church, and as such is susceptible to judicial encroachment upon the protection of the First Amendment. Church property disputes should only be resolved by civil courts solely upon "neutral principles of law" and not upon religious doctrine. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra.* Unfortunately, the Court below exceeded this Court's limitations in *Presbyterian Church, supra.*, and its guidelines set forth in *Maryland and Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.,* 396 U.S. 367 (1970).

At the outset, the District Court found the appellants to be proper parties with capacity to sue in the federal court. Likewise, respondents were found to be proper parties. The issue concerned entitlement to the proceeds of a condemnation award for St. Andrew's, a property dispute within a civil court's sphere of review. Appellants relied upon local law involving express trusts and equitable liens, a permissible constitutional approach under the "neutral principles of law" doctrine of the *Presbyterian Church case*. See *e.g., Serbian Orthodox Church Congregation of St. Demetrius* v. *Kelemen*, 21 Ohio St. 2d 154, 256 N. E. 3d 212, *cert. den.*, 400 U.S. 827 (1970).

However, the District Court's decision, as affirmed by the Court below, is permeated with the constitutionally proscribed preponderant concern for church organization, the extent of the utilization of church property for religious services and the size of the parish. For example, the District Court stated:

> "A circumstance influencing any view of the matter is the consideration that the church property used by the congregation of St. Andrew's was not as a whole designed or particularly well suited to function as a parish church for a small congregation. . . . The regular liturgical services conducted by the small congregation performed the indispensible diocesan function of preventing the loss of property under the reverter clause. It is not found, however, that the congregation's utilization of the property at any time constituted a full utilization of the resources of the property, nor is it found that the needs of the congregation at any time warranted a congregational or diocesan capital expenditure of the magnitude represented by the church property acquired under the 1953 grant." (Appendix B, p. 21a).

Again, at p. 25a of Appendix B, the court said:

> "It is important to note that the property was the property of the diocese; it was not parish property acquired through parochial contributions and fund raising efforts. The parish, rather, only had the *use* of the diocesan property, and parochial use was never of a kind or on the scale that reflected the size, composition and intrinsic value and utilities of the church property."

The question of a parish's size to qualify as an entity for the use and occupation or entitlement to specific property for use as its place of worship certainly appears to be a question of religious doctrine beyond the scope of a civil court's supervision. *Watson* v. *Jones,* 13 Wall. 679 (1872). Indeed, it is doubtful whether a religious denomination itself, let alone a civil court, has or can readily establish any formula expressing religious worship as a function of the number of worshipers and the size of their edifice.

Appellants relied at trial upon an express agreement with respondents concerning the disposition of the condemnation proceeds. Internal agreements between a parish and the diocese with respect to property should be determinative between the parties for purposes of civil litigation. While this Court has not specifically held that an oral agreement, if enforceable under local law, disposing of Church property could be relied upon by a civil court to settle a question of property under the "neutral principles of law", it appears to be a logical application of the "formal title" doctrine discussed by Mr. Justice Brennan in a concurring opinion in the *Maryland and Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.,* 396 U.S. 367 (1970). To same effect: *Smith* v. *Church of God at Locust Valley,* 326 F.

Supp. 6 (D. Md. 1971), where the District Court, citing *Sharpsburg, supra.*, stated at p. 13 of 326 F. Supp.:

> "Both under the law [Maryland Corporation Law] and in the absence of that law, the voluntary internal agreements of the Eldership and the two local churches herein involved with regard to control of church property upon withdrawal from the denomination are determinative."

But the lower court's preoccupation with church organization and parish size as being "[a] circumstance influencing any view of the matter [disposition of the condemnation proceeds]" resulted in a constitutionally proscribed involvement in religious doctrine, and prevented the lower court from deciding the case on neutral principles of law.

CONCLUSION

For the reasons set forth above, it is respectively submitted that this petition for a writ of certiorari should be granted.

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[APPENDICES FOLLOW]

APPENDIX "A"

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 36—September Term, 1973.

(Argued November 26, 1973 Decided November 30, 1973.)

Docket No. 73-1425

MICHAEL KOZEMCHAK, PHILIP PRONZEN, and ARCHADY LEHACH, as the Board of Trustees of St. Andrew's Ukrainian Orthodox Church of Bridgeport, Connecticut,

Appellants,

v.

THE UKRAINIAN ORTHODOX CHURCH OF AMERICA and THE MOST REVEREND BISHOP ANDREI KUSCHAK, Ruling Bishop of the Ukrainian Orthodox Church of America,

Appellees.

Before:

MOORE, HAYS and TIMBERS,

CJJ.

Appeal from a judgment of the District Court for the Eastern District of New York, John E. Dooling, Jr.,

Appendix A

Judge, after a hearing on the merits in favor of the defendants and dismissing plaintiffs action.

Affirmed.

JOHN F. GRIMES (Connolly, Grimes & Cawse, New York, N.Y., on the brief) *for Appellants.*

WILLIAM P. MCHALE (Gehrig, Ritter, Coffey, McHale & McBride, Hempstead, N.Y., on the brief), *for Appellees.*

PER CURIAM:

We affirm for substantially the reasons given in the memorandum of the district court.

APPENDIX "B"

Memorandum of the United States District Court Incorporating Findings of Fact and Order for Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

File No: 69C1112

Appearances:

John F. Grimes, Esq. (Messrs. Connolly, Grimes & Cawse, of Counsel) for plaintiffs.

William McHale, Esq. (Messrs. Gehrig, Ritter, Coffey, McHale & McBride of Counsel) for defendants.

DOOLING, D. J.:

On and before April 13, 1953, the church property here in question was owned by the Missionary Society of the Diocese of Connecticut, which has been referred to as an Anglican or Episcopalian Church Society. Under date of April 13, 1953, by a deed recorded April 19, 1955, the Missionary Society of the Diocese of Connecticut conveyed to the defendant The Ukrainian Orthodox Churche of America, an ecclesiastical society, the Missionary Society's interest in the church property in question, which is located in Bridgeport, Connecticut. The grantor reserved title to the bells together with the right to enter and remove them, and it did later exercise that right. The habendum of the deed is to "The Urkainian Orthodox Church of America, and to its successors and assigns, to the only use and behoof of the said The Ukrainian Church of America, its successors and assigns forever so long as the said The Ukrainian Ortho-

dox Church of America shall use the same for church purposes, and in the event that said The Ukrainian Orthodox Church of America shall at any time use or permit the use of the property for other than church purposes or transfer or attempt to transfer said premises, or the use thereof, to any other person, firm or corporation, then title to the said premises shall forthwith revert to the grantor or its successors." The deed contained a further provision requiring the grantee to maintain a bronze tablet in memory of the Reverend E. F. Bishop on the sanctuary wall of the church or in the sacristy, the grantor or its successors to have the right to enter and repossess the premises if the grantee failed to maintain the bronze tablet.

The Ukrainian Orthodox Church of America is a church of the Eastern Orthodox rite and ultimately under the Ecumenical Patriarch of Constantinople. In this country The Ukrainian Orthodox Church of America is under the headship of its own Bishop and he in turn would look to the Eastern Orthodox Bishop, in the time latterly in question in the present case, Archbishop Iakovos of the Greek Orthodox Archdiocese of North and South America.

The church was not large, but the church property was fairly extensive. A monastery building was attached to the church and there was in addition a free standing rectory building. The buildings at the times in question were upwards of one hundred years old.

After the acquisition of the Church property in Bridgeport it became the subject of considerable vandalism in the 1950s. When the church property was first to be put to use as a Ukrainian Orthodox Church, the physical problem was therefore threefold: to restore the van-

dalism which took place apparently before and during the effort to rehabilitate the property, to make good the immediate structural needs of the church and monastery and rectory edifices and bring them up to the point of safe use, and finally to convert the church proper so that it would be suited to the Eastern Rite—specifically by building an iconostasis separating the congregation from the altar area and an altar—beyond the iconostasis —for the celebration of the liturgy.

The church was at first identified as the Church of the Holy Nativity; at a later date but before 1965 the church became known as St. Andrew's Orthodox Church and it continued under that name throughout the balance of the period in question. It appears that at no time were the parishioners numerous. The only evidence with respect to size is that by Christmas of 1957 there were about 50 or 60 regular parishioners in 25 families, more or less, and that as late as August of 1969, some months after the cessation of regular liturgical service at the church in April of 1969, there were at least 14 to 16 families, comprising 25 persons, more or less, who were still actively interested in the preservation of a St. Andrew's parish church.

At no time was the parish well-to-do. It could not at any time genuinely afford to support a priest, yet at no time did it receive any subsidy, sustenance or support from the diocese. The parishioners by their voluntary labors and their contributions of money and in kind took the church property in hand and accomplished all three of the physical tasks of restoration, repair and conversion which they faced when the property was acquired for Ukrainian Orthodox Church use. The parishioners themselves by their own voluntary labors and with hired labor, and through their own contributions of materials,

managed to restore the structural deficiencies of the ancient buildings, to paint them and clean them sufficiently so that the church could be used as a place of worship, and at length were able to install an iconostasis and an altar and to supply the icons usual in a Ukrainian Orthodox church, and so established a regular Ukrainian Orthodox place of worship. The work was by no means superficial. It included some rather large tasks such as the removal of an organ that was estimated to be seventy or eighty years old and was practically a supporting member of the church edifice in the altar and choir area. Removal of the organ left a great open space at the right-hand side of the altar and required the supplying of a floor, since the organ had rested on the beams and not on the floor, and the supplying of walls that would take the place occupied by the organ structure itself. Support columns had to be placed under the ancient beams both in the basement areas and elsewhere in church and monastery. In addition the church was painted and the first floor of the monastery building was restored sufficiently so that it could be used for meetings, rummage sales, etc. Enough was done in the rectory building so that the priest could stay in it on his weekend visits for liturgy and so that one priest could, for a time at least, live in the rectory first as resident priest, and, later, in the first period of his retirement.

While the work of the parishioners in thus bringing the church property up to the level of usability was very considerable and involved both very large amounts of psrsonally expended labor and considerable amounts of money, no definite figure can from the nature of the work and the lapse of time be placed upon it. It is enough to say that the evidence left no doubt that it was not merely superficial cleaning and sprucing up but consti-

tuted major rehabilitation, capital replacement, repair and steady maintenance for some years.

Meanwhile the parish had a series of clergymen, the first, Rev. Mark Farrell, serving from 1953 to 1960, the second, Rev. Nicodemus Warwick, serving from 1960 to 1963, and the third the Rev. Peter Keiluch, serving from 1963 until his retirement in 1965, and finally Father Gabriel Zapatocky. Exactly what the arrangements with the earlier pastors had been is not clear and is for present purposes not important. Father Zapatocky was not a resident pastor. He lived in Metuchen, New Jersey, was married (as is permitted in the Eastern Rite) and had regular secular work in New Jersey to which he had to devote himself throughout the week. He attended at the St. Andrew's Church for the weekends, staying in the rectory Saturday nights, celebrating the liturgy on Sunday, holding a meeting after liturgy with the parishioners, and, apparently as a matter of almost regular custom, having dinner thereafter with the president of the congregation, the plaintiff Michael Kozemchak.

The evidence is that the liturgy was performed by a regularly ordained clergyman, Father Zapatocky or his predecessors, on every Sunday except on occasions when, through accident, illness or otherwise, the clergyman was unable to attend. On those occasions lay services would be conducted. The evidence is that on every Sunday religious service was conducted whether or not the divine liturgy was performed.

It is clear that at all times the Bishops, first Bishop Bohdan, who had been Bishop since 1937 and continued as Bishop until his death in November 1965, and thereafter Bishop Andrei Kuschak, who was consecrated and installed as Bishop in January 17, 1967, and continued as

Bishop through the present time, were acutely conscious that it was imperative that the condition of the deed be kept to the letter so that it could not be said at any time that the church property was being used for anything other than church purposes or that there was ever a cessation in the use of the property for church purposes. The evidence is clear too, that the members of St. Andrew's parish were made aware of the imperative importance of the condition and that they proceeded in the consciousness of their obligation to perform the condition if the church property was not to be lost to The Ukrainian Orthodox Church.

In the years covered by the evidence it appears without contradiction that St. Andrew's Church and the congregation of St. Andrew's church never at any time incorporated, and that neither church nor congregation was given any formal structure of any form recognized under Connecticut or New York statute law. The church and congregation were not formally organized as a religious association, a religious society, a membership corporation, an unincorporated membership corporation or otherwise. The church and congregation did not have any written constitution prepared or adopted by the members of the congregation. The church and the congregation did not have any bylaws in writing which had been adopted by the members of the congregation or agreed upon by them. Nor so far as appears, did any of the pastors or either of the Bishops impose any such regulations, bylaws or constitution on the church and its congregation so as to give it a formal structure reflected in any writing.

However, the evidence, and it is uncontradicted, is that the congregation did regard itself as having a customary organization. The custom of meeting after liturgy on Sunday took the form, according to the evidence, of weekly

meetings of the congregation. Annual elections were held at which three officers and trustees were elected, the officers and trustees being the same persons. Notice of the annual election of the officer-trustees was not formal. It consisted in making the fact of the forthcoming meeting known to the congregation at the Sunday meetings immediately preceding the annual meeting. At the period in question and apparently from an early date the officer-trustees were plaintiffs Michael Kozemchak, President and Trustee, Philip Pronzen, Secretary and Trustee and Archady Lehach, Treasurer and Trustee. It is to be noted that the last regular pastor of the church, Father Zapatocky, in a long report to Most Reverend Archbishop Iakovos under date of January 17, 1966 (made two months after the death of Bishop Bohdan and a year before the investiture of Bishop Kuschak) took the view that the church had no elected officers and that he as pastor was officially administrator, president, treasurer and secretary combined, and that he had selected a Mr. Archady Lehach from among the parishioners to make the collections, and an unofficial representative "president," Michael Kozemchak. In a newspaper article in the Bridgeport Post on April 9, 1966, Michael Kozemchak is shown with Father Zapatocky and is identified as choir director. However, by a communication of September 22, 1966, to The Ukrainian Orthodox Church of America interim consistory Father Zapatocky as pastor submitted as authorized lay-representatives of St. Andrew's parish at the general council meeting to be held at Allentown on September 24, 1966, the names of Michael Kozemchak, President, Archady Lehach, Treasurer, and Philip Pronzen, Secretary (caretaker of monastery property).

The parish and/or congregation did, at least in 1966, have a printed letterhead reading "St. Andrew's Ortho-

dox Church (formerly the monastery of the Holy Nativity), 105 Sylvan Avenue, Bridgeport, Connecticut 06606"; a telephone number is given and there is a printed reference to the ecumenical patriarchate with the current Bishop's name above the name of the pastor with his home address. The designation of lay-representatives of September 2, 1966, exhibits the use of a paper-pressing seal reading "The-Monastery-of-the-Holy-Nativity" in the outer circle and inside that and in circular form disposed about a cross "St. Andrew's—Orthodox—Church." Two dates are given in the seal, the date of 1864 in the circle containing the name of the monastery and a date which appears to be 1953 in the circle where the name St. Andrew's-Orthodox-Church appears.

It is not contended that St. Andrew's Church was open for daily worship. During a period, not precisely identified, when there was a resident pastor living in the rectory, it was possible to keep the church open on a daily basis, so that parishioners could pay "visits" to the church, but the date and duration of that period were not made clear by the evidence.

The diocese did unequivocally recognize the existence of the church and the congregation, although not, it must be found, in a way having distinctively legal clarity. How Pastors before Father Zapatocky were chosen is not clear; presumably they were appointed by Bishop Bohdan. In any case, by an instrument in writing dated May 8, 1965, by virtue of the power invested in Bishop Bohdan as Bishop and Metropolitan and Primate of The Ukrainian Orthodox Church of America and Canada, he named, nominated and appointed Father Gabriel John Zapatocky as "Permanent and Irremovable Pastor of St. Andrew's Orthodox Church (formerly the Monastery of the Holy Nativity) 105 Sylvan Avenue, (rectory 19 Corson Street),

Bridgeport, Connecticut, with proper salary and stole-fees attendant with the same. His term of office is with life tenure. We request that the faithful of the parish . . . shall consider the Reverend Gabriel John Zapatocky, as their Spiritual Head in all matters pertaining to that office."

At Christmas 1957 Bishop Bohdan celebrated Holy Liturgy at the church of the Holy Nativity (as the church was still identified) and at a meeting or celebration following the celebration of the Holy Liturgy, Bishop Bohdan in substance told the congregation with intended formality that the Church of The Holy Nativity was their church, that they were to take care of it, that he would supply them with a priest, that they would have to support the priest, and that as long as they had services in the church it would be their church forever. He explained that the deed contained three conditions: that they maintain the plaque of the Reverend Bishop, that they conduct weekly religious services, and that the property not be sold.

The evidence is, as already indicated, that the church property was in uninterrupted use. It is impossible to find that the church property was utilized to its greatest capability of use. The church property was used essentially as a missionary chapel; the use represented an underutilization of the church property. For example, the second floor of the monastery which apparently contained about ten living-quarter type rooms was not used at all. The five or six rooms on the first floor of the monastery portion of the property were apparently used to some extent for meetings, but whether all of the rooms were used and, if so, to what extent is not clear. Use of the property was intermittent, for meetings, rummage sales and church social events. The church proper, how-

ever, was used, was well maintained and, as the photographic exhibits demonstrate, at least from 1960 on presented an excellent and well maintained appearance in apparent conformity with Eastern Rite liturgical requirements.

The threat of a claim of reverter on the part of the grantor was apparently never too far removed. An instance is reflected in the letter of January 17, 1964, from the Trinity Episcopal Church in Waterbury which expressed the understanding that the church property was not being used, and it proposed that it be used by a monastic order of the Episcopal Church which was engaged in working among the poor.

In September of 1964 Bishop Bohdan made another visitation to the Church of St. Andrew during the pastorate of Father Peter Kieluch, and near his retirement. At that time the Bishop said to the congregation, in substance, that the wolves were around the church and monastery; some at least of his listeners understood him to refer to the intimation from the grantor that the property might be reclaimed under the reverter; the Bishop continued by saying that "they" were trying to get in "here," and that the parishioners should get themselves a stick and chase the wolves out. The Bishop continued to say, in substance: This is your church and don't let anybody have it; it's up to you people doing what you are doing, keeping religious services going here, and if you do that you will not have any trouble.

Bishop Bohdan had held office since 1937 and the evidence is that, whatever other capacities he may have had, he was not regarded by some of the clergy as a good administrator. He was becoming enfeebled through ill health, his hand and handwriting were palsied and, while he was not of great age, being only about seventy to

seventy-one years in 1964-1965, he was apparently finding it increasingly difficult to conduct the business correspondence of the diocese and to take care of his own domestic establishment. There is not however, any indication that he had lost his mental capacity or that his faculties of understanding and decision were impaired. While he died in November of 1965 a letter in evidence of August 6, 1965, indicates that he had a good grasp of what was going on.

At just this juncture in 1964-1965 and evidently beginning in 1964 there were intimations that Connecticut Route 25 was going to be relocated and that, while alternative routes were under apparently active consideration, one possible route would involve taking the whole of the church property. St Andrew's parishioners made inquiry and they made some organized effort to participate in or to influence the public decision-making, but by August of 1965, as appears from Bishop Bohdan's letter of August 6, 1965, the fear that the highway would involve loss of the property had become very real to Father Zapatocky, to the Bishop and to the congregation, and that fear was rendered more acute by the threat that it would furnish an occasion for the grantor under the reverter to claim either to take back the whole of the property or else to share in any award. Bishop Bohdan in 1965 did not think that the prospect was good and expressed the hope that Father Zapatocky and his flock could "make a reasonable agreement with Hartford and avoid hard feelings. He [Father Zapatocky] has already looked at a few sites but inner city lots are too costly. Still he thinks a prefabricated building migh[t] save on labor costs."

One of the church members, Anthony Kowalsky, under date of November 3, 1965, inquired of the State Highway Department about the location of the new Route 25, and,

by letter of the Highway Department dated November 10, 1965, he was told that, while no final determinations had been made, "the preliminary studies have seemed to indicate that the St. Andrew's American Ukrainian Orthodox Church located at 105 Sylvan Avenue will be affected." By January 17, 1966, when Father Zapatocky wrote his extended report to Archbishop Iakovos it appears that condemnation was regarded as most likely, and that Father Zapatocky had obtained on an informal basis legal advice that indicated to him that the condemnation would not result in a forfeiture of the diocesan interest in the property under the terms of the grant since it would represent a taking and not a voluntary sale. Father Zapatocky expressed the view that the congregation's maintenance of the church had preserved and enhanced its value from the condemnation point of view. Father Zapatocky anticipated that in settlement an award of at least $250,000 would be attained, but he indicated that local businessmen and property owners, for reasons which Father Zapatocky regarded as doubtful, had suggested that he ask as little as $150,000 for the property.

There was an interregnum from the death of Bishop Bohdan in November of 1965 until the investiture in January of 1967 of Bishop Andrei Kuschak as Bishop Bohdan's successor (Bishop Kuschak was nominated in September 1966). In July of 1966 (during the interregnum) a Ukrainian Orthodox Diocesan gathering was held at St. Andrew's Church. While the Ukrainian Orthodox Church apparently looked for ultimate authority in the interregnum to Archbishop Iakovos, there was an interim consistory of the Ukrainian Orthodox Church that functioned in some way in the interval, and apparently at all of the times from 1965 or thereabouts forward until his death Father Zapatocky in addition to being pastor of

St. Andrew's was secretary of the consistory of the Ukrainian Orthodox Church of America.

Not long after September of 1966, it became evident that the condemnation was a certainty, and before Bishop Kuschak's installation Father Zapatocky as secretary of the consistory of the diocese retained Serge G. Mihaly as counsel to represent the Ukrainian Orthodox Church of America with regard to the taking of the church properties by the State of Connecticut for highway purposes and notice of that retainer was communicated to the State. The letters to Mr. Mihaly and to the State were written from Father Zapatocky's home address in Metuchen in the name of the Ukrainian Orthodox Church of America and Mr. Mihaly's acceptance of the retainer and statement of terms was addressed to Father Zapatocky as secretary of the consistory at Metuchen although Father Zapatocky's responsive letter of January 11, 1967 (which was written in the name of the interim consistory of the Ukrainian Orthodox Church of America) was written on the letterhead of St. Andrew's Orthodox Church. Although Father Zapatocky was the one who formally handled the retainer of Serge Mihaly, it appears that he had long been known to Bishop Andrei Kuschak, and that the choice of Serge Mihaly was the choice of the not yet invested Bishop and not the individual choice of Father Zapatocky.

Then follows the most highly controversial point in the case. After Bishop Andrei Kuschak had been installed in January 1967, some time in early February but after February 3, 1967, a typed letter was prepared on the letterhead of the "Ukrainian Orthodox Church of America Ecumenical Patriarchate" for the signature of Bishop Andrei Kuschak. The letter was adressed to Father Zapatocky who was addressed as Pastor of St.

Andrew's, Bridgeport, and its text was that, as Bishop and Primate of the Ukrainian Orthodox Church of America, Bishop Kuschak informed Father Zapatocky that it was his decision that the Parish of St. Andrew's Orthodox Church, the Rectory, in Bridgeport, "shall continue its existence, despite any condemnation of the property . . . and that you Father Gabriel J. Zapatocky shall continue as its pastor for life-tenure." A closing paragraph of the letter would have said that, in connection with the condemnation, Bishop Kuschak approved Father Zapatocky's retaining Serge G. Mihaly as attorney on the terms agreed upon.

Father Zapatocky is dead. His widow testified with vehemence to her belief that the letter had been signed, but her testimony falls short of proof that the original of the letter was ever signed or delivered. At the period in question all of the files of the consistory and, apparently, some of the files of the Bishop, as well as the correspondence files of St. Andrew's church were maintained in the Zapatocky household in Metuchen, since Father Zapatocky was secretary of the consistory as well as pastor of St. Andrew's and used his home as his base of operations for both his offices. Two unsigned copies of the letter were produced. One is a zerox copy of a carbon copy of the letter (Exhibit 15) and the other is a carbon copy with a pen and ink addition to it in the handwriting of Father Zapatocky (Exhibit C). Exhibit C has written on it a reference to the materials being supplied to Serge Mihaly, and then contains the following in Father Zapatocky's handwriting: "Your Grace, I solemnly promise, that after the condemnation—proceed-
above
ings, — I am at your disposal, for assignment, where your Grace may deem it necessary."—Below that appears Father Zapatocky's signature.

Appendix B

Bishop Kuschak testified that he and Father Zapatocky met at a restaurant on 86th Street, Manhattan, at about the time of the date of the letter preparatory to their going together to call on Archbishop Iakovos, whose residence was in Manhattan. Bishop Kuschak says that he did not sign the letter. Plaintiff Michael Kozemchak on the other hand says that Father Zapatocky exhibited to him at St. Andrew's at about this period a letter which, perusing the content of Exhibit 15, he thought was that very letter. The letter he saw was a signed letter, bearing a pen and ink signature and the handwritten cross which, apparently, both Bishop Bohdan and Bishop Andrei Kuschak placed before their signatures, at least on episcopal documents. While Bishop Kuschak's testimony in this area left much to be desired and his recollection was so imperfect that confidence in his testimony was necessarily undermined, it is concluded that plaintiffs have failed to sustain the burden of proving that the letter was signed and delivered by Bishop Andrei Kuschak. If the letter had been signed, except as to the pastor's tenure its meaning would be very uncertain; it promises nothing except that the parish as a recognized congregation of the Ukrainian Orthodox Church of America would continue after and despite the condemnation. It does not promise an interest in the proceeds of the condemnation or to provide new church property, or to give financial assistance in obtaining or supporting a new church property. Whether it implied some such promise is a separate question, but had the letter been signed, it could not have been found that, on the other evidence in the case, or taken with the other evidence in the case, the letter fairly implied either an undertaking to make over a part of the proceeds of the condemnation to St. Andrew's congregation so that it could establish a new church or an undertaking to see to it that St. An-

drew's congregation were housed in a church in Bridgeport either at the sole cost or with the financial assistance of the diocese.

It was evidently well understood that the condemnation proceedings were moving right along, and Bishop Kuschak says that the letter of July 1, 1967 (Exhibit 20), from him to Father Zapatocky (referring to extending the use of the church property to include a projected seminary and printing plant and to serve for annual diocesan pilgrimages) was prepared by Serge Mihaly and was really written "for the record" with a view to serving two interests in connection with the condemnation, *first*, the interest of preventing a forfeiture to the Episcopal Diocese by showing continuity of religious activity right down to the end, and, *second*, the existence of a definite and expanding program for the use of the church properties including the monastery space and facilities.

The formal taking in condemnation occurred on July 6, 1967, and the State deposited $171,800 as the damages assessed in respect of the property to the use of the person or persons entitled to it. While the title was taken the property continued to be used as church property. Indeed, it was used until April 1969. The deposit was not satisfactory to Mihaly or to the parties at interest. Apparently in the spring of 1968 Mihaly came to the property and there met with the active members of the congregation and impressed upon them that they should raise the property to a high level of evident maintenance and use, so that when the State appraisers made their next trip to look at the property, they would be in a position to put a higher value upon it. (It is not found that Mihaly then or ever advised the parishioners that the compensation for their effort would

be receipt of the award or enough money to build a bigger church. Tr. 194: that testimony is improbable and does not reflect what it is expectable that a lawyer would say in the circumstances. Nor is it found that such a statement on his part was authorized or that, if made, it would have the effect of altering legal relationships already existing.)

From that time in the spring of 1968 until late in the summer of 1968, a period of over four months, the members of the congregation expended strenuous efforts and considerable amounts of their own money to rehabilitate the property. First, a great deal of cleaning was done, the attic of the monastery was thoroughly cleaned out (it had apparently been in seriously bad condition): the basement areas were cleared of an accumulation of debris, rejected material, furniture, etc. that went back apparently for the life of the property. The upstairs rooms of the monastery were put in livable condition, actually supplied with furniture from the congregation's homes, with sheets, etc., from their homes, and all of the rooms were thoroughly cleaned and painted. It was estimated that over fifty gallons of paint were expended on the property, and extensive repairs were also made both to church, monastery and rectory so that everything was in good order and ready for final inspection. In addition much was done to landscape the grounds, put in plantings and a flower bed, and even to lay a sidewalk around the front of the church and leading off to the monastery side of it. One member of the congregation testified to his devotion of 12 to 15 hours a week of work in some weeks and 20 to 30 hours work in other weeks, and his estimate was that at least five other parishioners expended 20 hours a week of work, plus the work of weekend volunteers and the like. The harder working

parishioners did their work evenings as well as on the weekends.

The evidence of the parish work done to enhance the value of the property is uncontradicted and impossible to evaluate in dollars. It was very substantial and it is found that it approximated 2,000 hours of work. It is not clear to what extent, if at all, the work enhanced the award.

It is found that the parish effort expended upon the property was expended in the expectation that it would enhance the award, and upon the assumption that the congregation had an interest, never articulated or defined by or to them, in enhancing the award. There is no evidence that the members of the congregation expected to be remunerated for the work, labor and services with a money portion of the award as their individual compensation. It is found that the parishioners expected that what they were doing was directly related to the continuation of St. Andrew's as a parish and to the diocese's giving some kind of financial assistance toward the congregation's having church quarter for some continuation of St. Andrew's parish in Bridgeport. It is not found that the congregation relied on any express promise or implied promise or undertaking that the congregation would be entitled to the whole of the award for the purpose of establishing a new church or that their expectation was any more precise than that after the condemnation and the final taking of the church from them, they would be provided with financial assistance in obtaining the means of continuing worship in a place of worship as St. Andrew's parish.

Who was responsible for the expectation of the parishioners has not been established by a preponderance of the evidence. Father Zapatocky was either the source

or the conduit of statements which produced the expectation and induced the activities of the parishioners in the period of intense rehabilitation that extended from the spring to the last part of the summer of 1968. Plaintiffs have failed, however, to show that the diocese was responsible for the statements which produced the expectation and induced the activities of the parishioners, although it is clear that, to an extent not susceptible of measurement, their work may have materially enhanced the final award for the property.

It is not found that the difference between $170,000 and $290,000 was attributable to the parishioners' efforts; the quantum of enhancement would be a matter to be determined at best through expressions of expert opinion.

A circumstance influencing any view of the matter is the consideration that the church property used by the congregation of St. Andrew's was not as a whole designed or particularly well-suited to function as a parish church for a small congregation. It had been a monastic or seminarian establishment, and a very substantial part of the structures consisted in the two-story monastery wing abutting the chapel that was used as a church. The regular liturgical services conducted by the small congregation performed the indispensable diocesan function of preventing a loss of the property under the reverter clause. It is not found, however, that the congregation's utilization of the property at any time constituted a full utilization of the resources of the property, nor is it found that the needs of the congregation at any time warranted a congregational or diocesan capital expenditure of the magnitude represented by the church property acquired under the 1953 grant. The congregation over the

years had the advantage of an ecclesiastical capital investment at no capital cost to the parish in exchange for the congregation's maintenance of the property in the required use without excessive deterioration and with some making-up for previous under-mainteance and desuetude.

Under date of January 14, 1969, the State Highway Commissioner paid into Court the amount of $118,501.15 which, when taken with the original deposit of $171,800 constituted the entire award for the whole of the church property and all interests in it. There were certain encumbrances, apparently of modest size, and the reversionary interest of the Missionary Society of the Diocese of Connecticut to be taken care of out of the award. The aggregate award was therefore $290,301.15 and the amount of the award which was ultimately paid to the Missionary Society in respect to its reverter interest was $49,950 and $300 was paid in Clerk's fees. The net amount paid to the diocese was $240,051.15 from which legal fees and expenses must be deducted.

Services at the church continued until the latter part of April 1969 when all religious services ceased. The church structures were actually taken down apparently some time in July of 1969.

Under date of August 18, 1969, a meeting of the members of the congregation to the number of fourteen or fifteen persons representing perhaps as many as eight families occurred, and, apparently being a majority of the remaining persons who could be regarded as members of the congregation, the meeting adopted a resolution authorizing the retaining of counsel to commence a suit against the Orthodox Church Diocese to have the condemnation proceeds used for the benefit of the parish-

ioners of St. Andrews for the acquisition of another church to replace the one condemned and to take whatever action was deemed necessary to protect the parishioners' interest. Under date of September 9, 1969, Bishop Andrei Kuschak advised plaintiff Michael Kozemchak that the diocesan consistory advised and recommended that the congregation affiliate with the "Mother Church, St. Mary's on Beech Street. This Church as you know is in the process of beginning their new life. St. Mary's the Pastor and the Congregants, will be happy to provide you time for English Services, as much as their schedule permits." The law suit followed.

1. The parishioners were never incorporated under, for example, Article 8-A of the New York Religious Corporations Law (§§ 169-a to 169-e, applying to Churches of the Ukrainian Orthodox Church of America) nor any parallel Connecticut statute (Con. Gen'l. Stat. §33-243, seeming to permit of religious societies either incorporated or formed by voluntary association; a voluntary association must file articles in order to have the right to take legal title to land, etc., Conn. Gen. Stat. §33-245). But that does not mean that the parish congregation was devoid of associative being. See, *e. g.*, *McAuliffe* v. *Russian Greek Catholic Church*, 1944, 130 Conn. 541, 36 Atl. 2d 52, 60. Under New York CPLR §1025 such an unincorporated association may sue by its president or treasurer on behalf of the association, as authorized by General Associations Law, §§ 12-13, and foreign associations may so sue in the New York Courts. *Ayew* v. *Willard Hawes & Co.*, 1st Dept. 1937, 250 App. Div. 596, 295 N. Y. Supp. 49, aff'd 1938, 276 N. Y. 634.

Plaintiff Michael Kozemchak is president of the congregation and Archady Lehach is its treasurer. While

plaintiffs are designated as trustees the intention to sue on behalf of the association of worshippers is plain (amended complaint, par. Fourth); identity of the association and its officers is completely ascertainable from the pleadings and record and can be controlled by the form of judgment. Cf. General Associations Law §17.

Under Rule 17(b) reference is to New York law. *Mason* v. *American Express Co.*, 2d Cir. 1964, 334 F. 2d 392, 393 and fn. 1.

2. In the first cause of action plaintiffs allege a 1954 agreement by Bishop Bohdan that the property was to be held in trust for St. Andrew's parish if St. Andrew's repaired, maintained and used the property. As the findings made above demonstrate, the evidence forbids putting that interpretation of fact, and imposing that conclusion of law on Bishop Bohdan's words and acts.

3. In the second cause of action plaintiffs allege that after the first notice of condemnation was received, an agreement was made between the diocese and the parish that improvements of the property would be undertaken in order to obtain the highest possible condemnation award and the improvements made by the congregation enhanced the award by about $100,000. As the findings made above esablished, no agreement was made, although Mihaly did exhort the parishioners to undertake work which amounted in all to about 2,000 hours of parishioner effort and involved their expending an indeterminable amount of money for materials and supplies. There is no evidence that the work in fact enhanced the award, although, certainly, any evidence of active parochial use of the property tended to safeguard the claim of the diocese to the award as against the claim of grantor missionary society under the reverter language.

Appendix B

The facts as found above are that the parishioners were neither promised nor led to believe that they would receive the award or any specific part of it as a parochial church endowment but that they expended their effort and money in the expectation that the diocese would make some provision for a place of worship for St. Andrew's as a continuing parish. But, as has been found above, the diocese was not responsible for that expectation.

It is important to note that the property was the property of the diocese; it was not parish property acquired through parochial contributions and fund-raising efforts. The parish, rather, only had the *use* of the diocesan property, and parochial use was never of a kind or on a scale that reflected the size, composition and intrinsic value and utilities of the church property.

The plaintiffs have failed to establish the second cause of action—for the award or a share of its based on the 1968 improvement work and expense and the expectation in which they took place—by a preponderance of the evidence. Whether representatives of the diocese could commit themselves to such an undertaking is a separate matter. The property was diocesan church property, and it had to be administered as such in religious uses. In determining the uses, the diocese would have to be guided by religious, including parochial-religious, considerations. Cf. *Conklin* v. *State*, 3rd Dept. 1954, 284 App. Div. 193, 130 N. Y. S. 2d 618, 620-621; *St. Peter's R. C. Par.* v. *Urban Development Authority*, 1958, 394 Pa. 194, 146 Atl. 2d 724 (condemned church built with *parish* funds). The proceeds of condemnation had no predestinate dedication to St. Andrew's parish and its congregation, and, while fair compensation out of the

award for work done to enhance it could, no doubt, take an ingenious form, and be devoted by those who earned it is to the uses they chose—as, for example, Mihaly could his legal fee—it must be doubted that the diocese could undertake to devote all or an indeterminate part of the award to a particular religious use on any basis other than a diocesan judgment of the nature and dimension of the religious need as such.

4. The third cause of action is really contained within the second, but it is more explicit. It alleges an agreement to turn the proceeds of the condemnation over to St. Andrew's Church for the purpose of obtaining property and constructing a new church. As the findings above demonstrate, plaintiffs have failed to show the making of such promise.

5. The fourth cause of action alleges that as part of the settlement agreement, in which the reverter claim of the grantor Missionary Society was comprised, it was understood that the remainder of the award would be paid over to St. Andrew's Church for the purpose of acquiring property and erecting a new church. As the findings above demonstrate, plaintiffs failed to show that such a settlement was made, and that such an understanding was arrived at.

Plaintiffs argue that they ought at least to have a lien on the proceeds of the award as a means of preventing unjust enrichment, referring to Bishop Kuschak's testimony (Tr. 255). Cf. Restatement of the Law, Restitution §§40(c), 41(b). Again, the problem is with the absence of sufficient evidence to show the value of the work and the extent of enhancement of the award, if there was any enhancement, before reaching the question whether

an equitable lien can or should be imposed in the circumstances of the present case. Plaintiffs can, in any case, take only upon a trust for their unincorporated religious society, and, on the present record, that might simply result in reversion of the funds to the diocese if St. Andrew's is not longer an active parish and the members of old congregation have become members of other Eastern Rite church.

It must be concluded that plaintiffs cannot prevail in this action.

It is, accordingly,

ORDERED that the Clerk enter judgment that the plaintiffs take nothing and that the action is dismissed on the merits. No costs.

Brooklyn, New York
February 2, 1973.

JOHN F. DOOLING, JR.
U. S. D. J.

APPENDIX "C"

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and seventy-three.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILLIAM H. TIMBERS,
Circuit Judges,

MICHAEL KOZEMCHAK, PHILIP PRONZEN and ARCHADY LEHACH, as the Board of Trustee's of St. Andrew's Ukrainian Orthodox Church of Bridgeport, Connecticut,

Plaintiffs-Appellants,

v.

THE UKRAINIAN ORTHODOX CHURCH OF AMERICA and THE MOST REVEREND BISHOP ANDREI KUSCHAK, Ruling Bishop of the Ukrainian Orthodox Church of America,

Defendants-Appellees.

73-1425

Appendix C

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro,
Clerk

By: Vincent A. Carlin,
Chief Deputy Clerk